

## THE ONTARIO HUMAN RIGHTS CODE

R.S.O. 1970, c. 318, as amended

IN THE MATTER OF the complaint made by Mr. Egbert Watson of Downsview, Ontario, alleging discrimination in employment by Highway Trailers of Canada Limited and by Mr. Harold Smith, 1201 Aimco Blvd., Mississauga, Ontario.

A hearing before Professor John D. McCamus appointed a Board of Inquiry into the above matter by the Minister of Labour, The Hon. Robert Elgie, to hear and decide the above-mentioned complaint.

Appearances:        Mr. M. Badër,  
                         Counsel for the Ontario  
                         Human Rights Commission

Mr. E. Watson,  
The Complainant

Mr. M. Addario,  
Counsel for the Respondent

REC'D O.H.R.C.	
INITIAL	DATE
AUG 26 1983	



This complaint raises an allegation of racial discrimination in the context of a decision taken by the respondent employer to dismiss the complainant on July 24, 1980. The complainant, Egbert Watson, a black man from Jamaica, states in the complaint (Exhibit 1) that he believes the July 24th termination of his employment with Highway Trailers of Canada Limited, effected by Mr. Smith, the manager at the premises in question, was motivated by considerations of race, colour, nationality, ancestry or place of origin. It is contended on behalf of the respondents, however, that the dismissal was based exclusively on considerations relating to Mr. Watson's work performance and that neither the respondent Smith nor any other person involved in the decision to dismiss was motivated by considerations such as those alleged in the complaint.

The differences between the parties relate entirely to matters of fact and their resolution must be grounded ultimately on findings of credibility with respect to the principal witnesses who presented evidence on behalf of each party. Counsel representing the Commission and the respondent appear to be in agreement with respect to the applicable principles of law. It is accepted by both sides that the burden carried by the complainant and the Commission in a case such as this is to establish that improper bias was at least one of the factors giving rise to the decision to dismiss. This position has indeed been accepted by a significant number of Boards of Inquiry established pursuant to the provisions of the Ontario Human Rights Code. The jurisprudence on this point is usefully summarised in Keene, Human Rights in Ontario (1983) at pp. 299-301.



There was considerable discussion offered by counsel with respect to the question of whether, in a case where racial discrimination played only a part in the decision to dismiss, the fact that the employee in question would have been dismissed in any event could, or perhaps must, be taken into account in assessing damages. It was the view of counsel representing the Commission that the provisions of the Code would be significantly undermined if this were to be taken into account inasmuch as it would permit an individual who had acted in contravention of the Code to remain immune from liability for damages. It was argued on behalf of the respondent, however, that where the dismissal was one which would have occurred in any event because of, for example, unsatisfactory work performance, the necessary causal link between the discrimination and the injury sustained would be broken and no compensation for such injury should therefore be awarded. For discussion of this problem, see M.S. Brodin, The Standard of Causation in the Mixed-motive Title VII Action: A Social Policy Perspective (1982), 82 Cal. L. Rev. 292.

For reasons that will become clear in due course, it is not necessary in the present context to attempt to resolve this point of difficulty in the present case.

The matters of fact on which the parties are in agreement are relatively few in number and may be briefly stated. It is common ground that the complainant was hired by the respondent Smith to work for the respondent employer and that Mr. Watson commenced his employment on May 13, 1980. It was the practice of the respondent employer to retain employees for an initial probationary period of fifty working days during which they would be subject to dismissal without cause. Although the respondent's work force was





unionized, new employees did not acquire membership in the trade union until they had successfully completed this probationary period. It is also agreed that Mr. Watson was dismissed on the forty-ninth day of his probationary period.

The circumstances of the dismissal and the reasons for it are, of course, a matter of dispute. In essence, the evidence led in support of the complainant sought to establish both directly and indirectly that Mr. Smith, in reaching a decision to dismiss Mr. Watson, was motivated by an unlawful bias. The direct evidence related to statements which were attributed to Mr. Smith by Mr. Watson at their meeting on July 24, 1980, in which Smith communicated to Watson the decision to terminate his employment. It was Watson's evidence that Smith had plainly stated that he was "not interested to keep blacks here". The making of this statement was denied by Mr. Smith in his evidence.

The indirect evidence relates to certain incidents involving Mr. Watson and two of his non-white fellow employees, Mr. Angus Dwyer and Mr. Sam Ramsaroop, both of whom testified before this Board of Inquiry, each incident involving some contact with Mr. Smith in his managerial capacity or Mr. Bonar McKenzie, the foreman at the Aimco Blvd. operation of the respondent, Highway Trailers of Canada Limited. Mr. Smith and Mr. McKenzie also testified before this Board of Inquiry with respect to these various incidents.

Obviously, the burden of establishing material facts falls upon the complainant and the Commission and with respect to the





nature of the communications made by Mr. Smith at the time of the dismissal, a finding in favour of the complainant and Commission must rest upon a finding that the evidence of Mr. Watson is to be referred to that of Mr. Smith, a matter to which we will ultimately turn. Before doing so, however, it will be useful to look at a number of the allegedly suspicious circumstances and prior incidents which are alleged to suggest the existence of discriminatory patterns of conduct on the part of Mr. Smith and/or Mr. McKenzie.

With respect to most, if not all, of these circumstances and incidents, unchallenged and persuasive evidence led before this Board of Inquiry suggests that patterns of conduct of this kind have not been established with respect to either Mr. Smith or Mr. McKenzie. Thus, it was thought to be suspicious that Mr. Smith waited until the forty-ninth day of Mr. Watson's probationary period to dismiss him. In fact, however, the evidence indicates that it was not an uncommon practice at Highway Trailers to make decisions to dismiss late in the probationary period and that such decisions had been made with respect to non-white employees as well as Mr. Watson. The rationale for such delay was suggested to be two-fold. Even though an employee might not be performing sufficiently well to warrant permanent employment, it was suggested that if the respondent was very busy at the time in question, even an ultimately unsuccessful probationary candidate could provide useful service. Moreover, as Mr. McKenzie suggested, a delay of the decision to dismiss would give an individual a better chance to demonstrate the requisite ability or conscientiousness to warrant permanent



employment. Although one may suspect that inertia might be a third and unstated cause of delay in such cases, I am satisfied that no sinister motive has been established by the mere fact that Mr. Watson was not dismissed until the forty-ninth day of his fifty day probationary period.

Further, although allegations were made that non-white employees were less successful as probationary employees than white probationers, no clear and cogent statistical evidence in support of this allegation was presented. Indeed, the uncontradicted evidence of witnesses led on behalf of the respondents indicated that one of the non-white employees in question had left of his own volition and, more generally, that a pattern of over-representation, as it were, in the casualty statistics for probationary employees could not be established.

The conduct of Mr. Smith is of particular relevance, of course, inasmuch as it is the decision-making of Mr. Smith which is the subject matter of the present complaint. The uncontradicted testimony of Mr. Smith was to the effect that Mr. Watson was, in fact, the only non-white employee whom he dismissed during his managerial tenure at Highway Trailers.

It should further be noted that although the proportion of non-whites to whites in the workforce was the subject of much discussion in the evidence before this Board of Inquiry, the evidence does not indicate an under-representation of non-whites in the work force. Uncontradicted evidence led on behalf of the employer indicated that there were a number of non-white employees



at various levels of seniority both at the Aimco Blvd. operation of the respondent and elsewhere. In short, the evidence before this Board does not establish discriminatory patterns of decision-making either with respect to hiring in the first place or with respect to decision-making concerning the permanent retention of probationary employees.

The suspicious incident which was the principal subject of Mr. Ramsaroop's testimony and which also figured prominently in Mr. Dwyer's testimony related to an investigation of an alleged theft of tools owned by the respondent company. Both Mr. Dwyer and Mr. Ramsaroop were the subject of direct investigation by a police officer in the sense that their premises were searched. It appeared to be their view that the investigation resulted in some way from the initiatives of Mr. Smith and that this constituted some evidence of harrassment by Mr. Smith of non-white employees, or at least, the making of certain assumptions by Mr. Smith concerning their capacity for dishonesty which might suggest the presence of discriminatory attitudes. The explanation offered by Mr. Smith for the investigation of Mr. Dwyer was the following. Another employee had informed Smith that an employee named Teal had stolen certain property from company premises. Mr. Smith contacted the police and the matter was investigated by P.C: Victor Carse. P.C. Carse investigated the incident and, as a result, Mr. Teal, a white employee, was charged and convicted and dismissed from his job with the company. In the course of this investigation, however, Mr. Teal reported to P.C. Carse that Mr. Dwyer had also





stolen company property and it was in reaction to this advice, not from a suggestion of Mr. Smith, that the investigation of Mr. Dwyer's premises was undertaken by P.C. Carse. P.C. Carse himself testified before this Board of Inquiry and offered his own independent testimony to the same effect.

I am persuaded by the uncontradicted evidence of Mr. Smith and P.C. Carse that the investigation of Mr. Dwyer's premises resulted from the actions of Teal rather than Smith.

With respect to the investigation of Mr. Ramsaroop, it was Mr. Smith's evidence that this had in fact resulted not from an initiative of his own, but rather from an initiative of Mr. Dwyer. Smith testified that early in 1981 Mr. Dwyer came to him and indicated that Mr. Ramsaroop had possession of some personal tools of Mr. Dwyer's and of some company tools which had been missing. Smith testified that Dwyer sought his assistance in retrieving his own tools from Mr. Ramsaroop and, in response to this overture, Smith replied that all he could do would be to contact the police on Dwyer's behalf. Smith alleged that Dwyer consented to this, and that the police were therefore contacted. Ultimately, one P.C. Spence came to the Highway Trailers premises to interview Smith and Dwyer, during which interview Dwyer repeated the allegations he had made concerning Ramsaroop to Spence. Interestingly, Mr. Dwyer in his evidence-in-chief denied that he had ever had occasion to report to the company or any one in the company any missing tools, but ultimately conceded on cross-examination that he had indeed had a conversation with





Mr. Smith in which he discussed the problem of Mr. Ramsaroop retaining some of Dwyer's tools and of instances in which Mr. Ramsaroop had failed to return company tools to the "tool crib". Mr. Dwyer further confirmed in cross-examination that he passed on this information to the police in the context of an interview held at the company premises. I am persuaded, therefore, that it is more probable than not that the incident developed more or less in the manner described by Mr. Smith and that the investigation of Mr. Ramsaroop resulted from allegations made by Mr. Dwyer in this fashion rather than by reason of any desire on Mr. Smith's part to subject non-white employees to harrassment of this kind.

Mr. Ramsaroop, I should note, filed a grievance with respect to this incident and alleged in his evidence that this was an investigation provoked by discriminatory actions on the part of Mr. Smith. Indeed, Mr. Ramsaroop testified that this was merely one of a number of instances in which he had successfully grieved on this sort of basis. When asked for the specifics of these grievances, the only one adduced in evidence involved an incident in which Mr. Ramsaroop and a second employee, a Mr. Jones, were disciplined for an alleged incident of damaging company property. The grievance of Mr. Ramsaroop and Mr. Jones was ultimately settled and the discipline withdrawn. It must be emphasised, however, that the discipline in question was imposed as well on Mr. Jones, a white employee, and that there appears to be no evidence whatsoever of discriminatory treatment of Mr. Ramsaroop either in the initial process of discipline or in the ultimate resolution of the grievance.



In summary, the allegations of Mr. Ramsaroop that he had been subjected to discriminatory treatment of various kinds at the hands of Mr. Smith are not supported in the evidence. Although it may well be that Mr. Ramsaroop genuinely perceived that Mr. Smith was so motivated on these occasions, the evidence before this Board of Inquiry suggests that such perceptions are groundless.

Mr. Dwyer's testimony offered similarly unconvincing evidence of alleged instances of discrimination. Thus, it was Mr. Dwyer's view that he had been laid off on one occasion on a discriminatory basis. The lay-off in question was the subject of a grievance (Exhibit 15) which was ultimately resolved in Mr. Dwyer's favour. Ironically, however, a close examination of these circumstances of this lay-off and the history of Mr. Dwyer's employment situation with the company suggests that not only was the lay-off in question not motivated by racial bias, but that Mr. Smith's dealings with Mr. Dwyer prior to this occasion indicate that he was treating Mr. Dwyer in a very kind and beneficial fashion. Mr. Dwyer did not at the material time hold the proper qualifications for the position he held with the company and, more importantly, was apparently not prepared to undertake conscientiously a programme of study to acquire them. This fact has brought the company and Mr. Smith under some criticism from the Apprenticeship Branch of the Ministry of Colleges and Universities of the Province of Ontario and, indeed, ultimately the company was issued a "Direction to Comply" with the Apprenticeship and Tradesmen's Qualification Act,



the infraction being that the company was allowing an individual, Mr. Dwyer, to work within a trade, i.e. truck trailer repairer, where a "certificate of qualification" is required by law, without such qualifications. Mr. Bud Crane the Industrial Training Consultant with the Apprenticeship Branch, who was responsible for inspecting the conduct of work at Highway Trailers during this period, testified before this Board of Inquiry and indicated that he had urged Mr. Smith on a number of occasions to fire Mr. Dwyer. It was Mr. Crane's view that not only was Mr. Dwyer not qualified, but he was not making reasonable efforts to take advantage of the opportunities for training which were being afforded to him and accordingly, dismissal was the only appropriate course of action. It was Mr. Crane's evidence that on such occasions, Mr. Smith protested that this step should not be necessary and attempted to placate Mr. Crane and work out some new strategy for assisting Mr. Dwyer to get appropriate qualifications.

Prior to the lay-off subsequently grieved by Mr. Dwyer, then, Mr. Smith was confronted with a number of situations in which he was being pressed by a government official to dismiss Mr. Dwyer on the basis that his continued employment with the firm constituted an infraction of the Apprenticeship and Tradesmen's Qualification Act. Mr. Smith resisted these overtures, notwithstanding the fact that this would appear to provide an easy basis for accomplishing a dismissal. When ultimately Mr. Dwyer was laid off early in 1981, the explanation offered by Mr. Smith for this action, and I find it to be a credible one, was that in view





of the delegations he had received from the provincial government, Mr. Dwyer was the appropriate person to lay off in a situation where a lay-off was necessary. The view taken by the Union, however, was that this was not a material basis for choosing Mr. Dwyer, and accordingly the Union supported Mr. Dwyer's grievance. Ultimately the company concluded that the position taken by Mr. Dwyer and the Union was indeed correct. It should be noted, however, that it was apparently not the Union's view that the lay-off was motivated by racial discrimination. Mr. Paul Phillips, the Union official responsible for handling this grievance, presented testimony before this Board of Inquiry led on behalf of the Commission and Mr. Dwyer. And, although Mr. Phillips' evidence was otherwise supportive of some allegations made by other witnesses, it was not his view that the decision to lay off Mr. Dwyer was motivated by racial concerns.

It would be surprising indeed if such motivations had played a part in Mr. Smith's treatment of Mr. Dwyer. Mr. Smith had hired Mr. Dwyer in the first place, notwithstanding the fact that he was apparently not an individual who possessed sparkling qualifications for the work in question. If Mr. Smith was an individual strongly motivated by racial bias, it would have been very easy indeed for him not to have hired Mr. Dwyer in the first place. The evidence offered by Mr. Crane and, indeed, by Mr. Phillips, gives support to the view that Mr. Smith was, if anything, bending over backwards to be generous in his treatment of Mr. Dwyer. In summary, then, the evidence relating to Mr. Smith's treatment of Mr. Dwyer does not support Mr. Dwyer's allegation that Mr. Smith acted in a discriminatory fashion.



Not all of the allegations against Smith and McKenzie have fallen on such unfertile ground. What is conclusively established in the evidence is that Smith on at least two occasions and McKenzie on at least one occasion uttered remarks of a racial nature which might well have led Messrs. Dwyer, Ramsaroop and Watson to believe that these were men who were biased against blacks. Thus Mr. Phillips testified that in a heated exchange he had with Mr. Smith concerning Mr. Dwyer, Smith described Dwyer as "a lazy nigger". Mr. Smith confirmed that he had uttered this epithet and, although he conceded that it was a very inappropriate thing to say, he attempted to explain it away as an unfortunate remark made in the midst of a conversation in which he was very angry with Mr. Dwyer. As well, it was alleged, and Mr. Smith conceded, that he had joked in the midst of a line-up for coffee that "blacks should go to the back". This, he explained as an attempt, albeit one now agreed to be inappropriate, at humour. Another perceived slight was alleged by Smith to be unintended. Mr. Ramsaroop testified that Smith had instructed him not to get the seat of the truck he was driving black. Although Ramsaroop testified that he perceived this to be a racial insult, Smith indicated that employees frequently got grease from their coveralls on the seat <sup>that</sup> and /it was that problem he was addressing in his comment. McKenzie, for his part, conceded that he had instructed a fellow employee to "take the spook with you", in referring to Mr. Dwyer. Again, this was explained by McKenzie as an attempt at humour. Smith denied making one other remark attributed to him and,



as has been indicated above, denied making the remarks concerning the dismissal of blacks at the time of communicating to Watson the decision to terminate his employment.

Of all the evidence led for the purposes of establishing what I have referred to as indirect evidence of discriminatory attitudes on the part of Mr. Smith and Mr. McKenzie, it is only these allegations concerning the uttering of racial slurs which appear to be grounded in fact. The significance of these incidents must therefore be considered. First, it should be noted that there does not appear to be a general practice either participated in or tolerated by Smith as Manager in encouraging the making of remarks of this kind. Such remarks as were made were at most quite infrequent. Mr. Smith's remark concerning Mr. Dwyer was made in the context of an angry exchange. Mr. Smith testified that he was at that time fed up with Dwyer's refusal to make reasonable efforts to acquire appropriate qualifications and, while the remark in question is obviously inappropriate and cannot be condoned, it is perhaps not surprising that Smith was, in the circumstances, becoming somewhat impatient with Mr. Dwyer. The other remarks of both Smith and McKenzie were, although again not to be condoned, simply misguided attempts at humour. While such remarks might understandably lead employees to believe that both of these individuals were men who held racist attitudes, such remarks provide only a tenuous basis for attributing such attitudes. Certainly, in Smith's case, the general thrust of the evidence relating to his dealings with Mr. Dwyer suggests the contrary.





Further, the various incidents which were alleged to involve discriminatory conduct do not, when the evidence led before this Board of Inquiry is carefully assessed, offer any evidence of conduct motivated by such attitudes. In McKenzie's case, apart from any concerns implicit in Mr. Watson's complaint, there was no suggestion of racially-motivated conduct on his part. Remarks such as those made by Smith and McKenzie may, of course, give rise to reasonable suspicion with respect to the fairmindedness of the individuals making such remarks and may well, in the present case, have given rise to what appear to be misguided perceptions on the part of Mr. Dwyer and Mr. Ramsaroop that they were being discriminated against in a variety of ways. Isolated remarks of this kind do not, however, when considered against the totality of evidence relating to the experience of Mr. Dwyer and Mr. Ramsaroop, offer persuasive evidence that these men were subjected to discriminatory treatment by Mr. Smith or Mr. McKenzie. It is my view, therefore, that the complaint of Mr. Watson cannot draw any indirect or collateral support from the rather substantial body of evidence led concerning the work experiences of Mr. Dwyer and Mr. Ramsaroop.

We must turn, then, to consider the conflict in evidence between the allegations made by Mr. Watson and the explanations for his ultimate dismissal offered by the respondent, Harold Smith, and the foreman, Mr. McKenzie. As has already been mentioned, the allegation made by Mr. Watson most directly supportive of the complaint is the suggestion that in communicating the decision to dismiss Mr. Watson, Mr. Smith stated that he was "not interested





to keep blacks here". As well, however, Mr. Watson alleges that he was subjected to discriminatory treatment at the hands of Mr. Smith and Mr. McKenzie throughout the entire period of probationary service. In essence, Mr. Watson complains that he was not utilized in a manner consistent with his qualifications but was given work assignments which were intentionally demeaning. Thus, Mr. Watson is qualified as a Class "A" mechanic and, indeed, he alleges that in applying for the job at Highway Trailers he was responding to an advertisement which indicated that Highway Trailers wished to employ a Class "A" mechanic. Mr. Watson contends that when he was first interviewed by Mr. Smith he gained the impression that the work he would be doing was mechanical in nature, that is that he would be doing work on brakes, front end alignment, etc. The reality, however, Mr. Watson alleges, was that he was assigned to cleaning work seventy-five percent of the time and that the remaining twenty-five percent of his time was spent on what is called "pre-delivery inspection" work on trailers. There was one instance in which Mr. Watson was allowed to work on brakes and, with respect to that job, Mr. Watson contends that he was unfairly criticised for the work which he did on that occasion. These allegations were supported, to some extent, by the evidence of Mr. Dwyer, who maintained that Mr. Watson was forced to do cleaning work approximately eighty percent of the time.

In confronting the difficult task of assessing the relative credibility of the evidence tendered by Mr. Watson and Mr. Smith, careful examination of the evidence relating to Mr. Watson's work experience is of great importance.



The nature of the work at the Aimco Blvd. operation of Highway Trailers was described by Mr. Smith. Highway Trailers is a manufacturer of the trailer portion of the familiar tractor trailer. The Aimco Blvd. depot is the service operation through which new trailers manufactured by Highway Trailers are distributed and serviced. Thus, new trailers are forwarded to Aimco Blvd. and are the subject of "pre-delivery inspections" which amount to a routine check of various aspects of the trailer, following which defects uncovered are supposed to be repaired before possession of the trailer is turned over to the customer. As well, of course, this operation repairs defects arising in the course of usage and further, the Aimco Blvd. operation will do repair work on trailers manufactured by other firms. This is referred to internally as "off-the-road" work. During the particular period of time when Mr. Watson was employed by Highway Trailers, the Aimco Blvd. operation was very busy with pre-delivery inspection work. Something in the order of three hundred new trailers were being processed at or about that time. It follows that there is very little in the way of "mechanical" work being done at the Aimco Blvd. operation. Although occasionally some work needs to be done on brakes, the Aimco Blvd. operation was not licensed to work on tractors and did not do any mechanical work in the sense of engine repairs or other work on the tractor units. Against this background of undisputed fact, it was Mr. Smith's evidence that he would not have advertised for a Class "A" mechanic. If indeed he had advertised for the position taken by Mr. Watson, Smith maintained that he would have advertised for a qualified



truck trailer repairer. As has already been indicated, the truck trailer repair work is a licensed trade and it was this particular qualification which proved to be Mr. Dwyer's nemesis for a period of time. It would appear, then, that Mr. Watson's expectation that he would be doing a good deal of mechanical work was somewhat unrealistic. It was Mr. McKenzie's evidence that Mr. Watson felt he was over-qualified for the work being done at the Aimco Blvd. operation and that that, indeed, was probably true. It was Mr. McKenzie's evidence, however, that this attitude on Mr. Watson's part led to unsatisfactory work performance inasmuch as Mr. Watson frequently protested that he did not wish to do certain kinds of work, including body work on trailers. In McKenzie's view, Watson did not care about or put sufficient effort into the assignments given to him.

With respect to the issue of credibility, it is important to note that the allegations made by Mr. Watson with respect to the nature of his work assignments have been established to be untrue on the evidence led before this Board of Inquiry. The work done by the staff at the Aimco Blvd. operation is fully documented by "Work Orders". An employee is required to punch in and out on each job and thus it is possible to reconstruct the entire work performance of a particular employee. This was in fact done in the evidence led by the Commission concerning Mr. Watson's work assignments. The reality appears to have been that far from having been assigned seventy-five percent of his time to cleaning jobs, Mr. Watson spent only fifteen percent of his time on cleaning. Of the 412 hours of time Mr. Watson spent as an employee with







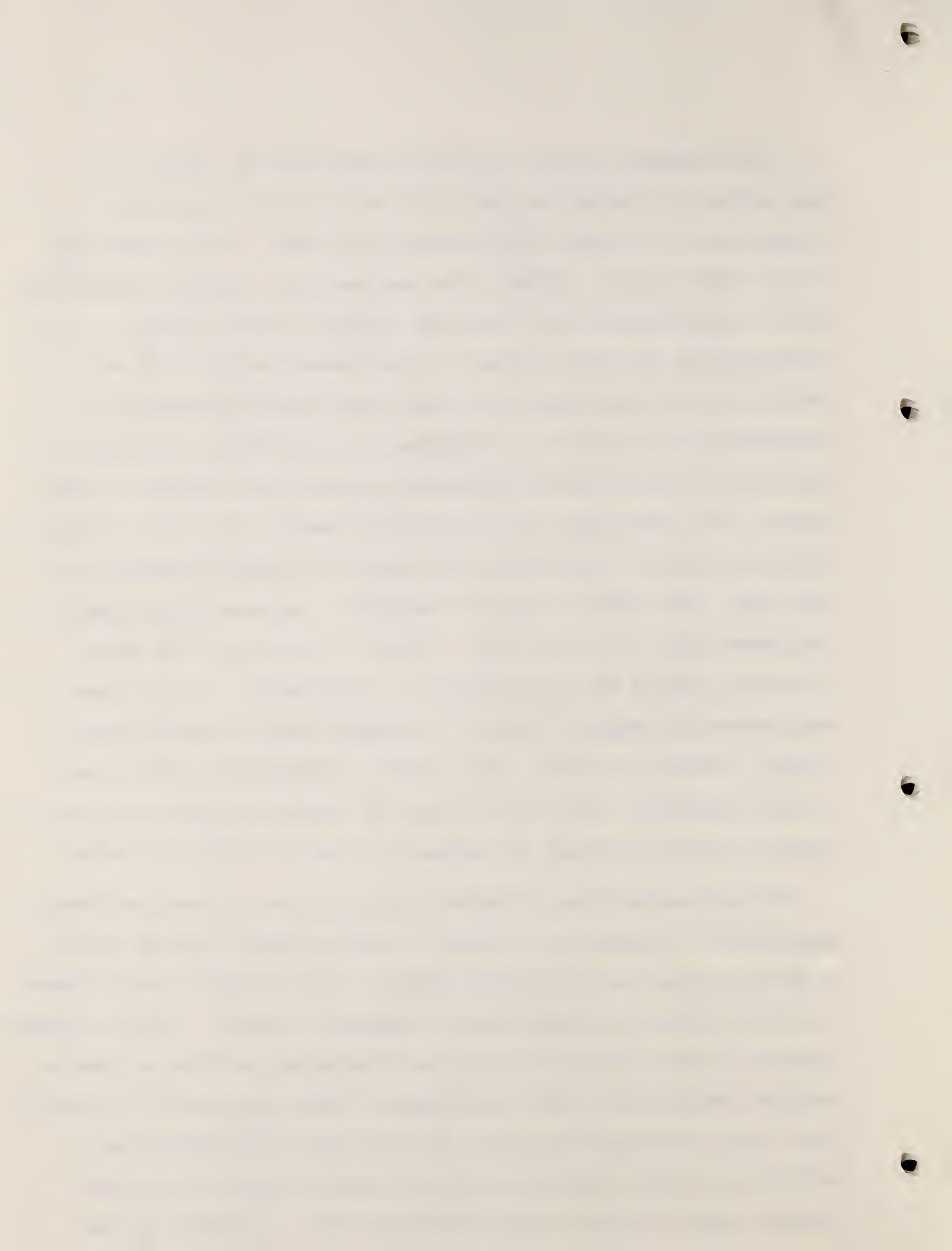
Highway Trailers, 75-3/4 hours were taken up with pre-delivery inspection work, 260-3/4 hours on service work, 59 1/2 hours on cleaning and 16 hours on paid holidays. No doubt it is the case that such cleaning assignments as there were weighed heavily on Mr. Watson's shoulders. Nonetheless, it is evident that Mr. Watson grossly exaggerated what was in his view maltreatment of this kind. Moreover, it is important to note that the evidence indicates that other employees spent considerable periods of time at cleaning jobs. Indeed, all employees appear to have had some, and the amount of cleaning did not appear to be necessarily linked to one's seniority. Thus, in a particular month, relatively senior employees would, for one reason or another, end up doing an unusually large proportion of the cleaning work.

It is true, however, that during Mr. Watson's last few weeks with Highway Trailers, he did shoulder a disproportionately large amount of the cleaning burden, and that over the period of time of his employment, his total was, as a result of this more intense period of cleaning work towards the end of his employment with Highway Trailers, greater than that of any other employee. The explanation offered for this by Mr. McKenzie was the uncooperative nature of Mr. Watson's response to work assignments and the fact that he took more time than was necessary on particular jobs. Thus, a fair amount of the work at the Aimco Blvd. operation involved repair work to the body of trailers. This work, claims Mr. McKenzie, Mr. Watson did not wish to take on and Mr. McKenzie responded to this by assigning Mr. Watson more cleaning.



The allegedly unfair criticism levelled at Mr. Watson for one instance of mechanical work related to his failure to put a new seal on the axle when replacing the wheel. It was the view of Mr. Smith and Mr. McKenzie that any mechanic, properly qualified, ought to appreciate that a new seal should be used in such circumstances and that, indeed, it was dangerous not to do so. Mr. Watson protested that a new seal would not be necessary in every case and that he was, therefore, being unfairly criticized. There was, however, some independent evidence with respect to this matter. Mr. Harry Chad, the Maintenance Manager of a firm called Disposal Services, testified with respect to general practice in this area. Mr. Chad, a Class "A" mechanic for over thirty years, indicated that in his view when a wheel is pulled off the axle, a new seal should be put on before it is replaced. In his view, any reasonably competent Class "A" mechanic would know this and indeed, failure to change a seal would be grounds for discipline. I find, therefore, that the criticism of Watson had some basis in general practice and does not appear to have been unfairly harsh.

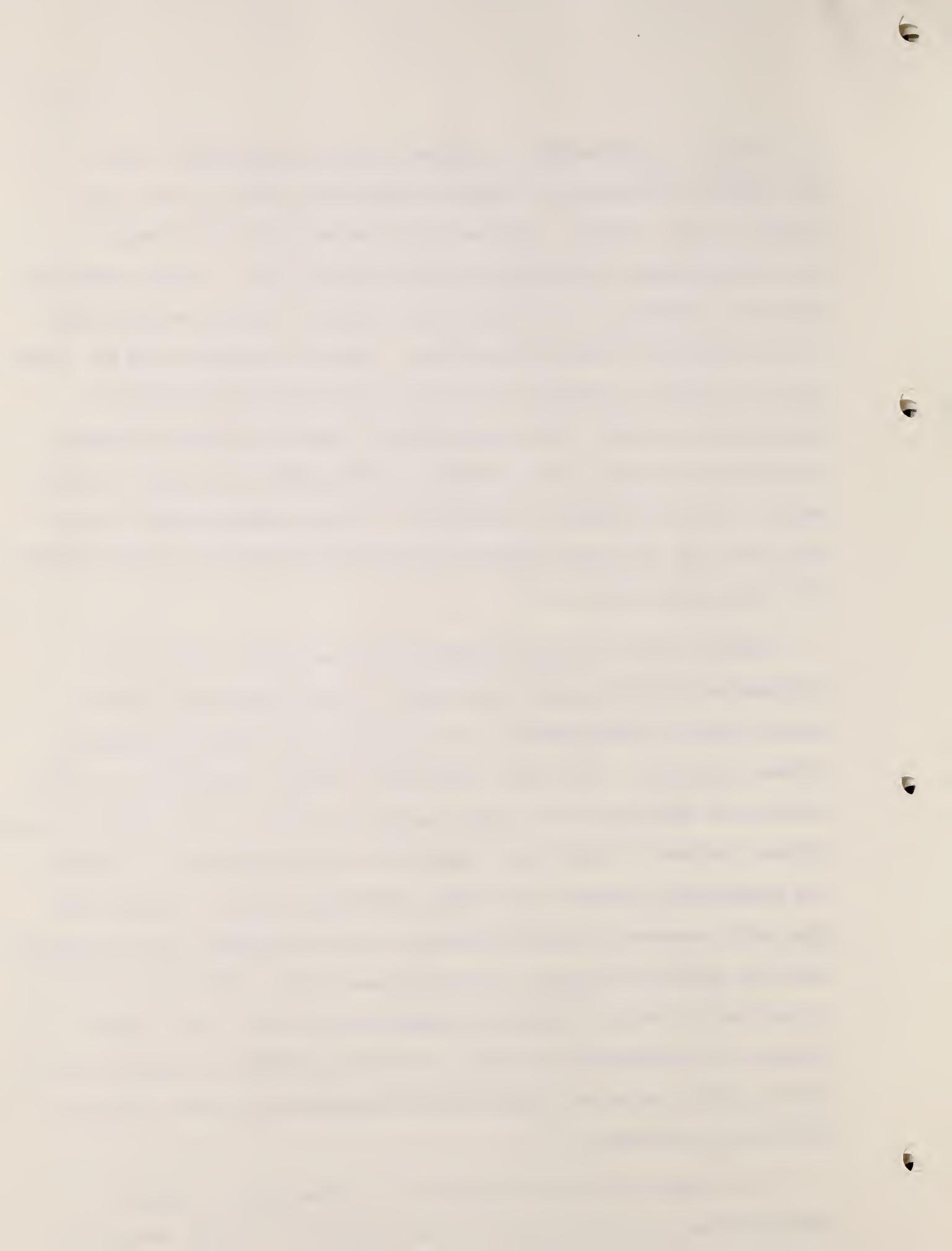
To some extent, the evidence concerning the oil seal incident is something of a tempest in a teapot. It was not the view of Smith or McKenzie that the principal problem with Mr. Watson's performance was that he was not a sufficiently competent mechanic. Their concern, apparently, was with his attitude and the amount of time he took to complete assignments. Some assignments, those relating to "off-the-road" work, involved estimates. Mr. McKenzie indicated it was difficult to assign such work to Mr. Watson inasmuch as he would usually take too long to complete assignments. Further, it was suggested that his attitude of disinterest in his work was manifested



by a number of instances of unconscientious behaviour. Thus, Mr. McKenzie indicated it was his experience that he had to go looking for Mr. Watson. He was not someone who would finish a job expeditiously and promptly seek further work. On one occasion, McKenzie climbed up on a trailer on which Mr. Watson was supposed to be working and found him asleep. Both Mr. McKenzie and Mr. Smith testified that an incident of this kind occurred on the day of termination as well. Mr. Dwyer and Mr. Watson had been assigned to clean up the yard. Mr. McKenzie discovered the two men sitting under a trailer having a cigarette. He then communicated this to Mr. Smith who came and observed the two men relaxing in this fashion for fifteen minutes or so.

Again, there was some corroborating evidence relating to problems of this kind with Mr. Watson's work performance from a witness who was independent in the sense of not being employed by Highway Trailers. Mr. Chad, referred to above, employed Mr. Watson at Disposal Services for a short period of time in the summer of 1978. In this context as well, Mr. Watson did not successfully complete the probationary period. Mr. Chad testified that Mr. Watson was dismissed because he took excessive time to complete work assignments and also because he made a rather serious error, putting a tie rod in backwards, which could have caused an accident. Mr. Chad's evidence is consistent, at least, with the evidence of McKenzie and Smith, which indicated a deteriorating confidence in Mr. Watson's value as an employee.

One further point of importance in attempting to reach a determination on the question of the credibility of Mr. Watson's





evidence relates to statements made by him concerning his work history. Mr. Watson testified that prior to his work at Highway Trailers he had been employed only by firms called Keylen Truck Leasing and Toro Automotive and that he had never been dismissed by a firm prior to his experience at Highway Trailers. Upon cross-examination, Mr. Watson conceded that he had also worked at Disposal Services, although he professed not to remember for how long a period of time he had worked there, and he denied that he had been fired by that employer. As well, he conceded that he had been employed by a firm named Fen-Mar but again, he professed not to recall how long he had been there. Mr. Chad's evidence, as has been indicated, was to the effect that Mr. Watson had indeed been employed at Disposal Services but had been dismissed for the reasons already indicated. It would thus appear that on a material matter, Mr. Watson has not been candid in his evidence before this Board of Inquiry.

In reaching a conclusion as to whether greater reliance should be placed on the evidence of Mr. Watson or that of Mr. Smith, a number of factors appear to be material. First, the evidence of Mr. Smith has been, in a number of respects, corroborated by other witnesses, including Mr. McKenzie, P.C. Carse, Mr. Crane and Mr. Chad. Further, in attempting to determine whether it is likely that Mr. Smith would have engaged in a dismissal on discriminatory grounds, it is of interest to note that not only did he hire Mr. Watson and other non-white employees, but appears to have been able to work successfully with Mr. Dwyer and Mr. Ramsaroop. Indeed, in Mr. Dwyer's case, Mr. Smith appears to have foregone opportunities to dismiss Mr. Dwyer, at a time when he was being pressed by the



Ministry of Colleges and Universities to do so. As far as Mr. Watson's evidence is concerned, it is apparent that to some extent his evidence offered a quite distorted picture of the work assignments made to him and would appear to have been deliberately misleading with respect to his work experience elsewhere. For these reasons, I am bound to conclude that, to the extent there exists a conflict between the evidence of Mr. Watson and Mr. Smith, the evidence of Mr. Smith should be preferred. It follows from this that I must conclude that the conversation between Watson and Smith at the time of Watson's dismissal was not as recounted by Watson and, in particular, did not involve Mr. Smith making a statement indicating that the dismissal was motivated by racial or other unlawful bias. Further I conclude on the basis of the totality of the evidence before me that Mr. Watson's performance at work was perceived to be unsatisfactory by both Mr. McKenzie and Mr. Smith and that Mr. Watson's dismissal appears to have been based on such considerations alone. Certainly, the Commission and the Complainant have not discharged their burden of establishing to the contrary on the balance of probabilities.

For these reasons, I conclude that the complaint made by Mr. Watson against Highway Trailers of Canada Limited and Mr. Smith is not supported by the evidence led before this Board of Inquiry, and should therefore be and is hereby dismissed.

DATED at Toronto this 29th day of July, 1983.



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John D. McCamus

